

HOUSE BILL 852

By Odom

AN ACT to amend Tennessee Code Annotated, Title 65,
Chapter 31, relative to underground utility damage
prevention.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Section 65-31-102, is amended by deleting subdivisions (2), (4), (8), and (12) and by substituting instead the following:

(2) "Damage" means any impact or exposure that results in the need to repair an underground utility due to the weakening or the partial or complete destruction of the underground utility, including, but not limited to, the protective coating, lateral support, cathodic protection, or the housing for the line, device, subsurface locating media or appurtenances of or underground utility;

(4) "Excavate" or "excavation" means an operation for the purpose of the movement, placement, or removal of earth, rock, or other materials in or on the ground by use of mechanized equipment, hand tools or by discharge of explosives, and including, but not limited to, augering, boring, pot-holing with mechanized equipment, backfilling, digging, ditching, drilling, grading, plowing-in, pulling-in, ripping, scraping, trenching or tunneling. "Excavate" or "excavation" does not include the tilling of soil for agricultural purposes, the digging of holes for fence posts on land zoned for agriculture purposes that is not located within a recorded easement of an operator or that is not located within one hundred feet of the edge of the pavement of a street or highway. "Agricultural purposes" includes surface activities, such as plowing, planting and combining, but does not include setting drainage tiles, subsoiling or other sub-surface activities;

(8) "One-Call Service" means a notification service described in § 65-31-107 that provides services to its members for the purposes of receiving and distributing notification regarding planned excavations or demolitions that are required under this chapter;

(12) "Utility" means any line, system or facility, including sewer service extensions, used for producing, storing, conveying, transmitting, or distributing communications, electricity, gas, petroleum, petroleum products, hazardous liquids, water, steam, sewerage or other underground facilities; and

SECTION 2. Tennessee Code Annotated, Section 65-31-102, is amended by adding the following language as new, appropriately designated subdivisions:

() "Abandoned underground utility" means an underground utility void of hazardous material and taken out of service by an operator on or after July 1, 2009;

() "Authority" means the Tennessee regulatory authority;

() "Contract locator" means any person contracted by an operator specifically to determine the approximate horizontal location of the operator's underground utilities that may exist within the area specified by a notice served on the one-call service;

() "Emergency" means a potential danger to life, health, or property, whenever there is a likelihood that loss of life, health, or property will result before the procedures under §§ 65-31-106 and 65-31-108 can be fully complied with;

() "Hand digging" means any excavation involving non-mechanized tools or equipment. Hand digging includes, but is not limited to, digging with shovels, picks, and manual post hole diggers, vacuum excavation or soft digging;

() "Horizontal directional drilling" or "HDD" means a type of trenchless excavation that uses guidable boring equipment to excavate in an essentially horizontal plane without disturbing or with minimal disturbance to the ground surface;

() "Positive response system" or "PRS" means the automated information system operated and maintained by the one-call service at its location that allows excavators, locators, operators, and other affected parties to determine the status of a locate request;

() "Open cut utility locate" means a method of locating underground utilities that requires excavation by the operator or agent of the underground utility;

() "Record drawing information" means maps, drawings, diagrams, sketches, or any other depictions or descriptions of an underground utility that reflect the location at the time of installation in a reasonably accurate manner;

() "Roadway surface milling" means the removal of a uniform pavement section not including the base or subbase by rotomilling, grinding, or other means;

() "Sewer service extension" means the "T" or "Y" on a sanitary sewer main and any pipe extension out to the boundary of the right of way for the purpose of providing a point of connection for a property owner's sewer service line;

() "Unlocatable underground utility" means an underground utility that cannot be marked with reasonable accuracy using generally accepted techniques or equipment commonly used to designate underground utilities. This term includes, but is not limited to, nonconductive underground utilities and sewer service extensions and nonmetallic underground utilities that have no subsurface locating media or records that indicate a specific location;

SECTION 3. Tennessee Code Annotated, Section 65-31-105(a), is amended by deleting the language "except operators participating in a" in the first sentence and by substituting instead the language "until becoming a member of the".

SECTION 4. Tennessee Code Annotated, Section 65-31-105(e), is amended by deleting in the first sentence the words and punctuation "After March 27, 1978,".

SECTION 5. Tennessee Code Annotated, Section 65-31-106, is amended by deleting the current subdivision designation (a)(1) and by re-designating it as a new subsection (b), by deleting the current subdivision designation (a)(2) and by re-designating it as a new subsection (c), and by re-designating the subsequent subsections accordingly.

SECTION 6. Tennessee Code Annotated, Section 65-31-106, is further amended by adding the following language as a new appropriately, designated subsection:

() No person, including operators, shall request marking of a site through the one-call service unless excavating is scheduled to commence, and the excavation shall be completed within a fifteen (15) day period. In addition, no person shall make repeated requests for re-marking, unless the repeated request is required for excavating to continue or due to circumstances not reasonably within the control of such person.

SECTION 7. Tennessee Code Annotated, Section 65-31-107, is amended by deleting the section in its entirety and by substituting instead the following:

§ 65-31-107.

All operators operating or maintaining underground utilities within the state shall participate as members in, and cooperate with, the one-call service. The activities of the one-call service shall be funded by all operators. All operators shall provide an accurate description of their service upon becoming members of the one-call service. Only one (1) one-call service shall be formed and operated within this state.

SECTION 8. Tennessee Code Annotated, Section 65-31-108(a), is amended by deleting the subsection in its entirety and by substituting instead the following:

(a) Each operator notified in accordance with § 65-31-106 shall stake or otherwise mark, prior to the noticed time of the proposed excavation or demolition, the surface of the tract or parcel of land affected by the excavation or demolition to indicate the approximate location of all its underground utilities that may be damaged as a result

of the excavation or demolition. The operator shall not be required to indicate the depth of any such utility, but only the approximate ground location under which the utility is located. In the event more than one (1) operator uses the same color code under this subsection, each operator using the same color shall include a distinctive marking, such as the initials of the operator's name or other marking which appropriately identifies each operator and sufficiently distinguishes each operator's marking from any other operator authorized to use the same color under this subsection. Such staking or other marking shall utilize the following color code:

(1) SAFETY RED shall be used to mark electric power distribution and transmission facilities;

(2) HIGH VISIBILITY SAFETY YELLOW shall be used to mark gas and oil distribution and transmission facilities;

(3) SAFETY ALERT ORANGE shall be used to mark telephone, telegraph, cable television, video and other telecommunication facilities;

(4) SAFETY PRECAUTION BLUE shall be used to mark water systems facilities;

(5) SAFETY GREEN shall be used to mark sewer system facilities; and

(6) SAFETY PURPLE shall be used to mark reclaimed water.

SECTION 9. Tennessee Code Annotated, Section 65-31-108, is amended by deleting subsections (d) and (g) and by inserting the following language as new subsections and by redesignating the current subsections accordingly:

(d) For the purposes of this chapter, the location of underground utilities that is provided by an operator in accordance with subsection (a) of § 65-31-106 to any person shall be accurate to within twenty-four inches (24") measured horizontally from the outer edge of either side of such underground utilities.

(e) If, upon arrival at the site of a proposed excavation, the excavator observes clear evidence of the presence of an unmarked utility line in the area of proposed excavation, the excavator shall not begin excavating until two (2) hours after an additional notification is made to the one-call service for the area. The operator of the underground utility shall respond to mark its underground facilities as described in subsection (a) of this section.

(g) Each operator notified of an emergency in accordance with § 65-31-109, shall stake or otherwise mark within two (2) hours, utilizing the color code set forth in subsection (a) of this section, the surface of the tract or parcel of land affected by the excavation or demolition to indicate the approximate location of all its underground utilities that may be damaged as a result of the excavation or demolition.

(i)

(1) Within three (3) working days following receipt by the one-call service of the locate request filed in accordance with § 65-31-106, each operator shall determine whether or not unlocatable utilities other than sewer service extensions are present. In the event that such utilities are determined to be present, the operator shall exercise reasonable care in locating such utilities. The exercise of reasonable care shall require, at a minimum, the use of the best available information to designate the utilities and notification to the one-call service of such attempted location. Placing markers or otherwise leaving evidence of locations of underground utilities is deemed to be an acceptable form of notification to the excavator or locator.

(2) This subsection shall not apply to sewer service extensions.

SECTION 10. Tennessee Code Annotated, Section 65-31-111(a), is amended by deleting the subsection in its entirety and by substituting instead the following:

(a) Except as provided by subsection (b), in the event of any damage to or dislocation or disturbance of any underground utility including appurtenances, covering or coating in connection with any excavation or demolition operation described in § 65-31-104, the person responsible for the excavation or demolition shall, immediately upon discovery of such damage, notify the operator of such utility of the location and nature of the damage and shall allow the operator reasonable time to accomplish necessary repairs before completing the excavation or demolition in the immediate area of such utility.

SECTION 11. Tennessee Code Annotated, Section 65-31-112, is amended by deleting the section in its entirety and by substituting instead the following:

§ 65-31-112

(a) Enforcement of this chapter by the authority shall follow the procedures described in this section. Nothing in this section shall limit the authority delegated to the state by the federal government or authorized pursuant to state law.

(b) Any person who, while engaging in excavation or demolition, intentionally fails to comply with this chapter by failing to provide notice to the operators of the underground utilities near the excavation or demolition area through the one-call service as required by § 65-31-106 shall be subject to a penalty of up to ten thousand dollars (\$10,000) for each separate offense up to a maximum penalty of one hundred thousand dollars (\$100,000).

(c) Every person who, while engaging in excavation or demolition, has provided the notice to the operators of underground utilities in or near the area of the excavation or demolition through the one call service as required by § 65-31-106, but otherwise intentionally or recklessly damages any underground utilities shall be subject to a penalty of up to ten thousand dollars (\$10,000) for each separate offense.

(d) Every person who, while engaging in excavation or demolition, has provided the notice to the operators of underground utilities in or near the area of the excavation or demolition through the one-call service as required by § 65-31-106, but otherwise, while acting reasonably, damages any underground utilities, may not be subject to a penalty, but shall be liable to the operators for costs incurred resulting from the damage to their underground utilities provided the underground utility is properly marked as provided in § 65-31-108.

(e) Every person who, while engaging in excavation or demolition, provides notice to the operators through the one call service as an emergency locate request and the locate request is not an emergency locate request as defined in § 65-31-106 shall be subject to a penalty of up to two thousand five hundred dollars (\$2,500) for each separate offense.

(f) Any operator who intentionally fails to comply with this chapter by a failure to mark the location of an underground utility or by a failure to provide notice that underground utilities are not within the proposed excavation or demolition area as required in § 65-31-108, or who intentionally fails to respond after being notified of planned excavation or demolition through the one call service, shall be subject to a penalty of up to twenty-five thousand dollars (\$25,000) for each separate offense.

(g) As provided in § 65-31-107, any operator who fails to join the one call service by January 1, 2010, shall be subject to a penalty of one hundred dollars (\$100) per day for each separate offense. Each day an operator fails to comply with this subsection shall constitute a separate offense.

(h) No operator of an underground utility shall be subject to a penalty where a delay in marking or a failure to mark or properly mark the location of an underground utility is caused by conditions beyond the reasonable control of such operator, provided

that the operator notifies the one-call service of the delay within three (3) days of the initial request through the PRS.

(i) Except for the purpose of re-marking or during the course of the excavation for which the markings were made or after completion of the project, any person who removes, alters, or otherwise damages markings, flags, or stakes used to mark the location of an underground utility shall be subject to a penalty up to one thousand dollars (\$1,000) for each separate offense.

(j) The authority shall have the power and jurisdiction to, and shall, enforce the provisions of this chapter. The authority may impose civil penalties as provided in this section. The authority may also require participation in a training program either in addition to or in lieu of civil penalties. The authority shall certify any such training programs and providers of such programs that are approved for this purpose. The authority may promulgate rules and develop enforcement policies in order to implement compliance with this chapter. When a penalty is warranted, the following criteria shall be used in determining the magnitude of the penalty:

- (1) Seriousness of noncompliance;
- (2) Culpability of offender;
- (3) Any history of noncompliance for the eighteen months prior to the date of the incident;
- (4) Ability to pay penalty;
- (5) A showing of good faith by the offender;
- (6) Ability to continue business; and
- (7) Other special circumstances.

(k) The authority may, by order entered after a hearing on notice duly served on any person not less than thirty (30) days before the date of the hearing, impose civil penalties provided herein if the authority finds a violation of this chapter.

(l) All such actions under this chapter shall be conducted in accordance with the Uniform Administrative Procedures Act, compiled in title 4, chapter 5.

(m) All penalties recovered in any action under this chapter shall be paid into the public utilities fund. Each year the authority shall review the amount of money paid into the public utilities fund as penalties recovered in actions under this chapter. The authority shall allocate an appropriate amount of said funds received as penalties recovered in actions under this chapter for the purpose of increasing public awareness regarding underground utility damage prevention.

(n) If, after receiving proper notification as required in § 65-31-106 an operator fails to locate its utilities as required in § 65-31-108, and an underground utility of such operator is damaged by an excavator who has otherwise complied with the provisions of this chapter, the excavator shall not be liable for any such damage which is demonstrated to be a proximate result of the operator's failure to locate.

(o) The authority, through its rules of practice and procedure, may utilize an alternative dispute resolution process to address complaints made under this chapter.

SECTION 12. Tennessee Code Annotated, Title 65, Chapter 31, is amended by adding the following, new, appropriately designated section:

§ 65-31-1__.

(a)

(1) Within three (3) working days following receipt by the one-call service of the locate request filed in accordance with § 65-31-106, each operator shall determine whether or not underground utilities are located on the tract, parcel of

land, or public right of way upon which the excavation or demolition is to occur. If underground utilities are determined to be present, the operator shall designate, through stakes, flags, permanent markers, or other marks on the surface of the tract or parcel of land, the location of underground utilities.

(2) An operator is not required to mark its own utilities within three (3) working days if the operator or its agents are the only parties performing the excavation; however, such utilities shall be marked prior to the actual start of excavation.

(b)

(1) Within three (3) working days following receipt by the one-call service of the locate request filed in accordance with § 65-31-108 and for the purpose of HDD, each sewer system operator shall determine whether or not sewer service extensions are located or likely to be located on the tract, parcel of land, or public right of way upon which the excavation or demolition is to occur. If sewer service extensions are determined to be present or likely to be present, then the sewer system operator shall assist in designating sewer service extensions up to the boundary of the public right of way. Such assistance shall not constitute ownership or operation of the sewer service extension by the sewer system operator. A good faith attempt to comply with provisions of this subsection in response to a locate request shall constitute full compliance with this chapter, and no person shall be found liable to any party for damages or injuries as a result of performing in compliance with the requirements of this subsection.

(2) To assist in designating sewer service extensions, the sewer system operator shall provide its best available information regarding the location of the sewer service extensions to the excavator. Best available information shall

include, but shall not be limited to record drawing information. This information shall be conveyed to the excavator in a manner that may include, but shall not be limited to:

(A) Marking the location of sewer service extensions in accordance with subsection (a) of this section, provided that:

(i) Any sewer service extension designated using the best available information shall constitute a good faith attempt and shall be deemed to be in compliance with this subsection, provided that such mark represents only the best available information of the sewer system operator and may not be accurate; and

(ii) If a sewer service extension is unlocatable, a triangular green mark shall be placed at the sewer main pointing at the address in question to indicate the presence of an unlocatable sewer service extension.

(c) All underground utilities installed on or after January 1, 2010, shall be installed in a manner which will make them locatable using a generally accepted electronic locating method. All sewer service extensions and property owner sewer services from the end of the sewer service extension to the structure installed on or after January 1, 2010, shall be installed in a manner which will make them locatable using a generally accepted electronic locating method. In the event that an unlocatable underground utility becomes exposed when the operator is present or in the case of sewer service extensions when the sewer utility operator is present on or after January 1, 2010, such underground utility shall be made locatable through the use of a permanent marker or an updating of permanent records.

(d) Notwithstanding any other provision of law to the contrary, an operator may use a locator to designate any or all underground utilities. The use of a locator shall not relieve the operator of any responsibility under this chapter. However, by contract an operator may be indemnified by a locator for any failure on the part of the locator to comply with the provisions of this chapter.

SECTION 13. Tennessee Code Annotated, Title 65, Chapter 31, is amended by adding the following, new, appropriately designated section:

§ 65-31-1__.

(a) No person engaged in demolition or in excavation with mechanized excavating equipment shall strike, damage, injure, or loosen any underground utility that has been staked, flagged, or marked in accordance with this chapter.

(b) When excavation or demolition is to take place within the tolerance zone, the excavator shall exercise such reasonable care as may be necessary for the protection of the underground utility, including permanent markers and paint placed to designate underground utilities. This protection shall include, but may not be limited to, hand digging, pot-holing, soft digging, vacuum excavation methods, pneumatic hand tools, other mechanical methods with the approval of the operator, or other generally accepted methods. For parallel type excavations, the existing utility shall be exposed at intervals as often as necessary to avoid damage.

(c) When conducting trenchless excavation, the excavator must exercise reasonable care, as described in subsection (b) of this section, and shall take additional care to attempt to prevent damage to underground utilities. If HDD crosses natural gas service lines or is less than three feet (3') from a natural gas main at any point along the route of the HDD, pot-holing is required at sewer service extensions. The excavator will coordinate pot-holing along the drilling alignment with the natural gas utility operator so

that the operator can check for the presence of natural gas at the pothole locations. The authority is authorized to adopt by rule additional criteria to define additional care.

SECTION 14. Tennessee Code Annotated, Title 65, Chapter 31, is amended by adding the following, new, appropriately designated section:

§ 65-31-1__.

(a) The authority shall enforce the provisions of this chapter. The authority is empowered to promulgate rules to implement this chapter.

(b) The Tennessee one-call service board of directors may submit to the authority for consideration the names of persons to be appointed to an advisory committee. The authority shall appoint the members of the advisory committee that shall consist of the following:

- (1) One (1) member to represent the Tennessee department of transportation;
- (2) One (1) member to represent telecommunications companies;
- (3) Three (3) members to represent excavators;
- (4) One (1) member to represent electric cooperatives;
- (5) One (1) member to represent municipal electric providers;
- (6) One (1) member to represent utility districts;
- (7) One (1) member to represent cable television companies;
- (8) One (1) member to represent county highway commissions;
- (9) One (1) member to represent utility locators;
- (10) One (1) member to represent municipal water and wastewater departments;
- (11) One (1) member to represent local gas distribution companies;

(12) One (1) member to represent liquid petroleum and gas pipeline companies;

(13) One (1) member to represent the Tennessee one-call service; and

(14) One (1) member to represent the authority. This member shall be an ex-officio member.

(c) Persons appointed to the advisory committee shall have expert knowledge of this chapter and specific operations expertise with the subject matter encompassed by the provisions of this chapter. The new advisory committee shall be established within 60 (sixty) days of the effective date of this act.

(d) The advisory committee may assist the authority in the enforcement of this chapter and make recommendations to the authority regarding rules.

(e) The members of the advisory committee shall be immune, individually and jointly, from civil liability for any act or omission done or made in the performance of their duties while serving as members of such advisory committee, but only in the absence of criminal misconduct.

(f) Authority enforcement of this chapter shall follow the procedures described in this section. Nothing in this section shall limit the authority's duties and responsibilities delegated by the federal government or pursuant to state law.

(g) If authority investigators find that a probable violation has occurred, the investigators may recommend training in lieu of penalties to any person for any violation, and may provide suggestions for corrective action to any person requesting such assistance.

(h) Authority investigators may make recommended findings or offers of settlement to the respondent. A respondent may accept or reject the offer of settlement recommended by the investigators. If the respondent agrees with the offer of settlement,

the settlement shall be presented to the authority for consideration. If the respondent rejects the investigator's recommended settlement or the authority does not approve the recommended settlement, the respondent may seek an alternative dispute resolution procedure through the advisory committee's review of the settlement recommendation. The advisory committee shall then render a recommendation either supporting the investigators' recommendation, rejecting the investigators' recommendation, or substituting its own recommendation. The advisory committee shall consider the factors set out in § 65-31-112(j). If the advisory committee determines that a respondent has made a good faith effort to comply with this chapter, the committee shall not recommend civil penalties against the respondent.

(i) The advisory committee shall submit its recommendation to the authority for consideration. After notice and hearing, the authority shall make its determination regarding the appropriate sanctions if a violation is determined to have occurred.

(j) Any proceeding or civil penalty undertaken pursuant to this chapter shall neither prevent nor preempt the right of any party to obtain civil damages for personal injury or property damage in private causes of action.

SECTION 15. Tennessee Code Annotated, Title 65, Chapter 31, is amended by adding the following, new, appropriately designated section:

§ 65-31-1__.

(a) Any person may report a probable violation of this chapter by filing a written or an electronic report in a form as may be designated by the authority from time to time; provided that all such reports shall be filed electronically whenever and wherever possible, but a written report may be filed by a person lacking computer reporting or communication capability.

SECTION 16. The implementation of the provisions of this act relative to the enforcement duties of the authority as set out in Sections 11 and 14 of this act shall be contingent upon a sum sufficient to be provided annually from the one-call service to the authority. The authority is empowered to enter into an agreement with the one-call service to receive such funds. If the funds are not provided to the authority from the one-call service, the authority shall not be required to implement the enforcement duties of this act. However, all other provisions of this act shall remain in full force and effect even if funding is not provided for the authority's enforcement duties.

SECTION 17. Tennessee Code Annotated Section 65-31-109, is amended by deleting the word "imminent" and replacing it with "potential" and deleting the word "substantial" in the last sentence of subsection (a).

SECTION 18. This act shall become effective January 1, 2010, the public welfare requiring it.